

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * CIVIL ACTION
* 13-405S
*
STEWARD HEALTH CARE *
SYSTEM, LLC, et al *
*
VS. * JUNE 30, 2016
*
BLUE CROSS & BLUE SHIELD *
OF RHODE ISLAND *
*
* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE LINCOLN D. ALMOND
MAGISTRATE JUDGE
(MOTIONS HEARING)

APPEARANCES:

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1 30 JUNE 2016 -- 10:00 A.M.

2 THE COURT: Good morning. We're on the record
3 in the matter of Steward versus Blue Cross, Civil
4 Action 13-405S, before the Court today for a hearing on
5 Plaintiff's Motion to Compel, Document Number 102, and
6 Defendant's Motion to Compel, Document Number 111.

7 Can the attorneys participating in this hearing
8 identify themselves for the record, starting with
9 Plaintiff.

10 MR. DAWSON: Thank you, your Honor, and good
11 morning. Christopher Dawson from Whelan, Corrente,
12 Kinder and Siket on behalf of the Plaintiffs; and I'd
13 like to introduce to the Court from Williams & Connolly
14 in Washington, D.C., Steven Kuney --

15 MR. KUNEY: Good morning, your Honor.

16 MR. DAWSON: -- and James Weingarten.

17 MR. WEINGARTEN: Good morning, your Honor.

18 THE COURT: All right. Who is going to argue
19 today?

20 MR. KUNEY: I'm going to argue our motion, your
21 Honor, and Mr. Weingarten is going to take the lead on
22 defending the second motion.

23 THE COURT: Okay. All right.

24 For the Defendants today?

25 MR. TARANTINO: Good morning, your Honor. John

1 Tarantino for Blue Cross. I will be arguing our
2 motion.

3 And with me, who I believe you've met before,
4 Justin Bernick will be arguing against the Plaintiff's
5 Motion to Compel. And also with me is my colleague
6 Leslie Parker. For a minute I was going to say Pat
7 Rocha.

8 THE COURT: I knew it wasn't Pat. I knew it was
9 Leslie.

10 All right. I'd like you to try to summarize
11 your arguments as much as possible. I think there were
12 well over a thousand pages of briefs and exhibits filed
13 with respect to these motions.

14 And just as a housekeeping matter, hopefully
15 there aren't going to be future disputes; but to the
16 extent there are, it's not helpful to the Court to get
17 post-briefing letters. It just doesn't work well for
18 our system because everything goes into CM/ECF,
19 everybody knows what the record is, where to look. If
20 I get letters that come in, if they don't make it to me
21 or they make it to me and they go into a different
22 pile, it's hard to keep everything together; so if you
23 could refrain from that in the future.

24 If you need to file anything beyond the initial
25 motion and memorandum opposition and reply, you can

1 file a motion for leave to file supplemental memoranda,
2 and that's generally granted unless it becomes abusive.
3 So just keep that in mind in the future.

4 Why don't we start out with argument on
5 Plaintiff's motion, which is Document Number 102.

6 MR. KUNEY: Thank you, your Honor. And again,
7 I'm Steve Kuney from Williams & Connolly arguing on
8 behalf of the Plaintiffs.

9 THE COURT: Okay.

10 MR. KUNEY: I'm going to certainly try to heed
11 your Honor's request that we summarize and synthesize.

12 THE COURT: Well, you attached to your motion a
13 fairly detailed appendix that tried to summarize these
14 matters.

15 MR. KUNEY: Yes.

16 THE COURT: And then the defense sort of did a
17 blow-by-blow response to that in their opposition, so
18 it might be a good road map to use.

19 MR. KUNEY: Well, let me tell you what I had in
20 mind, and you tell me if you think it would not be
21 helpful.

22 THE COURT: Yes. Sure.

23 MR. KUNEY: Since at least as I read the papers
24 back and forth, a lot of the issue is whether we are or
25 aren't talking about what we have to prove with respect

1 to the conspiracy claims in the Amended Complaint. I
2 mean, this is all battles about discovery that relates
3 to the Amended Complaint.

4 THE COURT: Okay.

5 MR. KUNEY: I thought I would spend just a
6 couple of minutes explaining --

7 THE COURT: Sure.

8 MR. KUNEY: -- what we believe we have to prove
9 and where to look in the Complaint to find what we're
10 talking about.

11 THE COURT: Okay.

12 MR. KUNEY: Then with respect to the particular
13 requests at issue, what I've tried to do is give the
14 Court my best understanding of what the gap is between
15 the two sides, because on most of them we've asked for
16 something and they've offered something less, --

17 THE COURT: Yes.

18 MR. KUNEY: -- and it seems to me what's at
19 issue is that delta, and so I'm going to try to horn in
20 on that to the extent that I can.

21 THE COURT: Okay.

22 MR. KUNEY: And I'll try to do it as accurately
23 as I can, but let me just, with your indulgence, take a
24 couple of minutes with the, sort of, what is this
25 Amended Complaint all about and what are we doing here.

1 You know, we started with a case that involved
2 monopolization, a section to the Sherman Act, and last
3 August we amended the Complaint to add two conspiracy
4 counts. One is a conspiracy to monopolize; the other
5 is a conspiracy in restraint of trade, in violation of
6 Section 1 of the Sherman Act.

7 There's some overlap in what's necessary to
8 prove those with the original claims that we've
9 brought, but there's some distinctive features that
10 relate to those claims. We have to prove the existence
11 of the conspiracy. We have to prove the
12 anticompetitive effects that flow from the
13 conspiracies, which may or may not be identical to the
14 anticompetitive effects that flowed from the unilateral
15 conduct we'd alleged in the original Complaint.

16 We also have to show antitrust injury and
17 damages, but I don't think those elements have much to
18 do with the discovery disputes this morning. I think
19 it's really about the first two. It's what do we have
20 to -- what would we be doing at trial to prove the
21 conspiracy that we've alleged and to show the requisite
22 anticompetitive effects.

23 And it's no secret to anybody that these days,
24 unless you're doing an antitrust case, which is a
25 follow on to a government and criminal investigation

1 where people have pled guilty, that conspiracies in
2 antitrust cases 95 plus percent of the time are going
3 to be proved by circumstantial evidence, and the courts
4 have spent a lot of time dealing with this.

5 We had this sort of anomaly of a circumstantial
6 proof case getting all the way to the Supreme Court,
7 that happens from time to time, but it typically
8 involves our showing -- our being obliged to show
9 motivations for the conspirators, and the technical
10 legal phrase is conduct that excludes independent
11 action, which usually means some pattern of
12 conspiratorial communications and some conduct that
13 would not be sensible if the parties were not acting
14 pursuant to an unlawful agreement.

15 In this case the motive discussion about the
16 parties is set forth at some length in the Amended
17 Complaint at paragraphs 33 to 37, that the parties all
18 thought they would be, they would be more successful in
19 achieving their anticompetitive purposes if they worked
20 together, that there was some political concern about
21 not wanting to be perceived as the party that was
22 responsible for causing Landmark to fail, and that each
23 had a separate motivation, a separate kind of
24 competition that they were worried about that Steward's
25 entry was a threat to.

1 For Blue Cross's side it was eventually a threat
2 to their insurance monopoly in one of two ways: Either
3 that Steward would be a vehicle for some other
4 insurance company to come into Rhode Island, or through
5 this beast that you saw discussed a lot in the
6 briefing, the accountable care organization, where
7 especially what happens is providers, the hospitals and
8 doctors take typically some -- at least in Steward's
9 model -- some sort of flat fee, rather than being paid
10 by service, and then it's their job to take care of the
11 patients who are being covered by the policy consistent
12 with the capitation amount that they've been given; so
13 the providers, the hospitals and the doctors, are
14 assuming some of the risk of how sick the patients get,
15 which is a risk historically borne by the insurance
16 companies. So it really involves the doctors and the
17 hospitals becoming a bit of an insurer in the financial
18 sense, not in the technical regulatory sense.

19 I don't know whether they're present up here,
20 but the kind of Kaiser Permanente organization is one
21 of the first ones nationwide that's sort of been big on
22 this; and radio commercials where I live, they come on
23 and say we've cut out the middleman or the doctor and
24 the insurance company; and that's very much what's
25 going on.

1 And what you can see in some of the exhibits
2 that we've attached is that that was precisely the
3 concern that Blue Cross had, was that this accountable
4 care organization was going to render the traditional
5 insurance company less relevant, less significant in
6 the marketplace, less powerful.

7 So paragraphs 33 to 37 set forth the motivations
8 of the conspirators: Blue Cross's, Lifespan's,
9 Thundermist's.

10 Paragraph 76 -- and I have to apologize for
11 this; I don't know how this happened, but in our brief
12 we repeatedly called it paragraph 77. It's not; it's
13 76. It's where we set forth the anticompetitive
14 effects that we're going to have to prove from the
15 conduct. And some of them are specific to Steward
16 which, again, excluding Steward from competing in the
17 relevant markets, forcing consumers who wanted to use
18 Steward hospitals to use somebody else. But some of
19 them are not, because particularly in a Section 1 claim
20 we're obliged not just to prove that we were hurt, but
21 we're obliged to prove that competition in the market
22 in general was hurt and that as a result consumers were
23 hurt.

24 So what you see in paragraph 76 is an
25 enumeration of anticompetitive effects that includes

1 not just keeping Steward out, but limit -- preventing
2 the introduction of lower cost insurance products in
3 Rhode Island, preventing new competition for Blue Cross
4 through the entry of other insurers, increasing the
5 cost of health care, limiting the competition that
6 Lifespan will face from community hospitals, preventing
7 the revitalization of community hospitals; points that
8 go to what will be our burden to show that not just
9 Steward was harmed by the conduct that we've alleged,
10 but the competition was hurt.

11 And that same theme can be found in paragraphs
12 105 and 135 of the Amended Complaint where some might
13 say happily there's a slightly shorter version of the
14 anticompetitive consequences.

15 Those are the two counts under Section 1, and
16 what they say in a kind of summary form is competition
17 was hurt by keeping Steward out, by preventing Steward
18 from facilitating new entry by other insurance
19 companies and by preventing new risk-sharing
20 arrangements between providers and insurers that would
21 have brought new competition to Rhode Island. And that
22 new risk-sharing arrangement is that accountable care
23 organization that is both a feature of the brief and
24 one of the topics that's sort of in front of us this
25 morning.

1 So we will have to persuade the fact finder that
2 we have appropriately shown the motivation of the
3 conspirators, that we have shown conduct that excludes
4 independent action because of the degree and nature of
5 their communications and because they're doing things
6 that wouldn't make sense if they were acting alone, and
7 let me just pause on that last one for a minute.

8 That was a big issue in the Judge Smith's
9 opinion on the motion to dismiss, whether Blue Cross
10 had foregone profits for the benefit of keeping Steward
11 out of the market. If anything, it's even more of an
12 issue here and it appears in the Amended Complaint
13 really in two different places.

14 In paragraph 52 there's a discussion of the
15 money that Blue Cross knew it would lose when it took
16 Landmark out of network and how the dollars that that
17 would lose, expected to lose from taking Landmark out
18 of network, because people would go to places that cost
19 more, and because they would be obliged to pay full
20 rates for people going to a non-network hospital, that
21 that was actually, that extra money it was going to
22 cost them to throw Landmark out of the network was
23 greater than the differential between their contract
24 proposal and Steward's contract proposal.

25 In other words they could have more cheaply met

1 what Steward was asking for than they could have borne
2 the cost of kicking Landmark out as a way of helping to
3 keep Steward out of the marketplace.

4 There's likewise a similar discussion in
5 paragraph 62 about St. Anne's. St. Anne's, seems to be
6 some question what's St. Anne's got to do with this
7 case; they're not even in Rhode Island.

8 What St. Anne's involvement in the case has to
9 do with is when they're taking care of people who are
10 from Rhode Island, not when they're -- from our
11 perspective, that's our view, that St. Anne's and other
12 border hospitals matter because Rhode Islanders seek
13 care there. Excuse me.

14 What's happened is that Blue Cross over the
15 years has had contracts with some of these bordering
16 hospitals in the state of Massachusetts precisely
17 because a lot of their subscribers go there. They've
18 decided to terminate Steward's contract at St. Anne's
19 and instead have their people use St. Anne's under
20 something called the BlueCard Program, which is a
21 program that many of the Blues around the country
22 cooperate in nationwide. If you're a Blue Cross
23 subscriber in Rhode Island and you're traveling in
24 California and something happens and you need to go to
25 a hospital you can -- there's a lot of hospitals you

1 can attend and you're covered just like you're at home
2 under the BlueCard.

3 Blue Cross has to pay a fee to Massachusetts
4 hospitals to use the BlueCard card, so the subscriber,
5 the ordinary charge is the normal charge for the
6 Massachusetts hospital; so the cost of Blue Cross, if
7 Rhode Islanders who have been going to St. Anne's start
8 going there under the BlueCard Program, it's the
9 Massachusetts rate plus this administrative fee that
10 they have to pay in order to participate as BlueCard.

11 Steward offered to continue the contract for
12 just the Massachusetts rate and save Blue Cross the
13 administrative fee, and they said no.

14 So that's described in paragraph 62 as another
15 example of people doing things that wouldn't be
16 sensible if they were just acting on their own for
17 normal business reasons.

18 We believe, and we think the jury will infer,
19 that they were doing it because of some combination of
20 exclusionary conduct on Blue Cross's own part and
21 conspiratorial conduct with the other parties involved.

22 Now, there's one more level of this, people
23 behaving in a way that wouldn't make sense in
24 competitive markets. What is going on in a big picture
25 sense between Blue Cross and Lifespan is that they're

1 helping each other become more dominant in the
2 marketplace.

3 The official claim we've brought is against Blue
4 Cross for conspiring to monopolize with others. In the
5 typical situation a Lifespan, i.e., a hospital network
6 would want more insurance companies competing to buy
7 hospital services from them because the more insurance
8 companies that are trying to buy hospital services,
9 typically the better off they'll do.

10 So it's not a normal competitive motivation for
11 a hospital to want to be dealing with a monopoly
12 insurance company. That's not how normal competitors
13 in competitive marketplaces behave.

14 Likewise, Blue Cross has throughout the case,
15 including in responding to our -- in their initial
16 motion to dismiss, been concerned about providers
17 having more market power.

18 There's allegations in the Complaint that when
19 Steward was going to come to Rhode Island, one of the
20 things that Steward was concerned about was a then
21 provision in the Hospital Conversion Act that would
22 have required a for-profit entity, upon buying a Rhode
23 Island Hospital, to wait three years before it could
24 get another one. Because everybody knew Steward wanted
25 to build a network and not just buy one hospital,

1 Steward sought and succeeded in getting that
2 legislation changed.

3 Blue Cross appeared in opposing that legislation
4 and said if you do decide to let Steward or anyone buy
5 more than one hospital, they shouldn't be able to
6 negotiate together as a network. Why? Because they
7 have more market power that way and can drive up rates,
8 drive up reimbursement rates. So typically Blue Cross,
9 acting in a competitive marketplace, would not want
10 Lifespan to be even more powerful as the dominant
11 provider than they already are.

12 But what's alleged in the Complaint is
13 essentially a *quid pro quo* at that level where the two
14 existing dominant firms agree to work together to keep
15 out new entrants who could disturb the present
16 monopolies that they have, monopoly and market power
17 that they have at their respective levels of the
18 marketplace. And we have to show that. That's part of
19 our burden. We will show that. And we'll show the
20 anticompetitive effects that I outlined before that
21 will follow from those.

22 So, okay; long windup. What are we fighting
23 about this morning specifically? And to maybe come
24 closer to your goal of summarizing, I've got the
25 disputed requests into three groups.

1 THE COURT: Okay.

2 MR. KUNEY: The first group is the first three,
3 which is requests 2, 4 and 5 from the fourth set of
4 requests, and these are requests that all relate to the
5 motive, to the conduct not being consistent with
6 unilateral self-interest, and to the anticompetitive
7 effects.

8 Request 4-2 we're seeking, Steward is seeking
9 documents that relate to communications, discussions,
10 plans between Blue Cross and Lifespan to get more
11 patients to Lifespan. Again, ordinarily Blue Cross
12 wouldn't want Lifespan to become even more important in
13 the marketplace than it already is.

14 What I understand they've offered is to produce
15 documents that have to do with Lifespan getting more
16 patients just from Landmark, but not from anybody else.
17 Well, two of the anticompetitive effects alleged in the
18 Complaint that we will be obliged to prove at trial are
19 that the anticompetitive effects included limiting
20 competition between Lifespan and community hospitals,
21 not just Steward, and preventing the revitalization of
22 community hospitals, not just Steward.

23 So the delta between the ask and the demand is
24 whether they should be obliged to produce documents
25 that relate to their efforts to funnel patients to

1 Lifespan generally or more narrowly just from Landmark.
2 And our view is that not only is that broader
3 conspiracy relevant to motive -- and to help the jury
4 understand why are they doing these things -- why are
5 they engaged in this behavior that otherwise seems
6 nonsensical, but it's absolutely pertinent to our
7 burden to prove harm to competition and not just harm
8 to Steward.

9 If you -- and I'm not going to go through the
10 details unless you want, but you can look at Exhibit 11
11 attached to our motion and you'll see an example of the
12 general discussion about Blue Cross proposing things
13 that will help Lifespan thwart outsiders who might want
14 to come into the market. It doesn't ever say Steward.
15 And as I read what they're proposing to offer, that
16 type of document would not be produced.

17 Now, obviously it's hard for me to describe to
18 you things that we haven't gotten, so what we are
19 looking at is documents that were produced, because
20 they were otherwise responsive, that based on the
21 limitation they've proposed we would not get. That's
22 4-2. Okay.

23 And we believe, again, that it's not, shouldn't
24 be unduly burdensome because we don't think there's
25 massive numbers of communications between Blue Cross

1 and Lifespan about this effort to funnel more patients
2 to Lifespan, but that those requests should not be only
3 patients that were going to come from Landmark, because
4 we have to prove more than that, and we expect to prove
5 more than that, and those documents that we're seeking
6 will absolutely help us do that.

7 Request 4-4 is really about why do people go to
8 hospitals -- well, how much and why do people go to
9 hospitals outside of Rhode Island. This gets back to
10 the St. Anne's issue and the border issue and the
11 market definition issue, candidly.

12 As I understand it, Blue Cross has offered to
13 produce documents sufficient to show how many people go
14 to hospitals outside and documents sufficient to show
15 efforts to bring them back.

16 The delta, if I understand it, is two-fold.
17 One, they don't want to give us any documents about why
18 people go to these other places. We are --

19 THE COURT: Explain to me why that's relevant.

20 MR. KUNEY: Okay.

21 THE COURT: I assume there's a lot of different
22 reasons.

23 MR. KUNEY: I assume there are a lot of
24 different reasons, and the question is going to be,
25 well, which of the geographic market is Rhode Island.

1 And I'm just expecting one of the things we're going to
2 hear is, well, you guys know that Rhode Islanders go to
3 hospitals in Massachusetts. And whether that makes --
4 whether that requires a different market definition
5 will depend not only on how many of them go, but what
6 the reasons are that they go. Is it the nature of the
7 care? Is it pricing? What is it?

8 It also has to do with the fact that a
9 significant aspect of the collaboration to funnel more
10 patients to Lifespan involved repatriating people who
11 are currently going to Massachusetts. Steward had the
12 misfortune to own two of those hospitals, so that
13 conduct, from our perspective, ended up being directed
14 directly at us. But it's part of the motive for the
15 conspiracy and it's part of the debate about who is
16 going to have the right answer on what the market
17 should be to know not just how many people are going,
18 but why they're going to hospitals elsewhere.

19 If people are going to hospitals in Boston
20 because they offer treatment that's unavailable in
21 Rhode Island, that has very different implications for
22 market definition than if they're going to a hospital
23 in Boston because they think the quality is better,
24 they think it's cheaper, they like taking side trips to
25 Boston; in other words, if there's not a service

1 differential issue but there's, rather, some other kind
2 of normal competitive reason that may make those
3 Massachusetts hospitals properly part of the relevant
4 market.

5 So to defend the market definition and to prove
6 the market definition, we have to explain and account
7 for the people that are going to Massachusetts
8 hospitals. And since they have a substantial number of
9 subscribers who go to hospitals, especially those
10 border hospitals in Massachusetts, it's important to
11 the proof of our case.

12 The last reason it's relevant, your Honor, is
13 one of the things that we've seen in their documents is
14 we need to keep Steward out of Rhode Island because
15 after all Steward is from Massachusetts and they're
16 going to send even more people back to Massachusetts.

17 Our view is understanding why those people are
18 going to Massachusetts and understanding how Steward
19 operates, you'd appreciate that that's ridiculous. But
20 to rebut that anticipated accusation and anticipated
21 from their internal documents, we need, again, what
22 they actually know and believe and have analyzed.

23 THE COURT: I understand your position. Move on
24 to number 5.

25 MR. KUNEY: Okay. Number 5 is about the

1 accountable care organizations, and the debate is
2 whether they can limit it to just accountable care
3 organizations that mention a few particular entities:
4 Thundermist, Lifespan, Landmark, Steward. Okay?

5 We've shown you, and this is -- I think the best
6 examples are Exhibits 23 and 20. These are the
7 documents where Blue Cross explains what the problem is
8 with the accountable care organization. It could make
9 the insurance company irrelevant. One of the documents
10 make some reference to it as a substitute for the
11 insurance company.

12 Those documents, those particular documents that
13 we've attached don't have the name of any accountable
14 care organization in them. They're talking about the
15 concept. That's the concept of who Steward was.
16 Everyone knows Steward was an accountable care
17 organization. That was the business that they were
18 proposing to bring to Rhode Island.

19 So would those documents that don't name Steward
20 be relevant because they explain the basis of their
21 antipathy to the very form of organization we had?
22 Absolutely they would. Should they be excused from
23 producing them because they should look at all the ACO
24 documents and say, ah, that one says why we hate ACOs
25 but it doesn't mention Steward; we don't have to give

1 them that one? I don't think so, your Honor.

2 And frankly it's not a massive document because
3 the time period that's relevant to the case, the
4 accountable care organization was a bit of a new beast.
5 It wasn't every piece of paper in anybody's
6 organization at all. It was a newbie that was
7 generating a lot of interest and concern, and we
8 believe on Blue Cross's part a lot of anxiety.

9 So those are actually among the most significant
10 documents that we've seen to date, even though they
11 don't mention the entities that Blue Cross proposes in
12 their restriction.

13 Okay. Second category. This is happily, I'm
14 sure, most of the remaining requests. Okay. Most of
15 the remaining requests have to do with the fact that in
16 establishing anticompetitive effects we will have to
17 deal with the argument that their conduct, which they
18 will say was pro competitive, they're legitimate
19 business reasons that justified the conduct and
20 legitimate business reasons for not dealing with
21 Steward and legitimate business reasons for terminating
22 the St. Anne's contract.

23 In a variety of cases ambulatory surgery
24 centers -- that's request 5-1, that's request 1, the
25 fifth, said use of this BlueCard, that's 5-3, 5-6, the

1 OHIC regulations, that's 5-19 and 5-20, and I believe
2 the quality standards, which is 5-16 and 5-17. When
3 you talk about the ambulatory surgery center, Saint
4 Anne's Hospital acquired an ambulatory surgery center,
5 which I guess to you and me would mean sort of it's an
6 outpatient stand-alone. It's not a hospital; it's a
7 stand-alone outpatient surgery. It's not uncommon that
8 when hospitals buy those, they go through the
9 regulatory process to, in effect, make what used to be
10 the surgery center now part of the hospital. That has
11 reimbursement consequences because as a general matter
12 hospitals get paid more than stand-alone surgery
13 centers.

14 So part of the St. Anne's Blue Cross dispute was
15 about the financial consequences of St. Anne's
16 acquiring an ambulatory surgery center, converting it
17 to hospital space and as a result collecting higher
18 reimbursement rates.

19 We're not -- Saint Anne's Hospital is not the
20 only hospital within the time frame covered by the case
21 that has converted an ambulatory surgery center to
22 hospital space. We know that from the documents that
23 we've received.

24 So we have asked for documents about those other
25 episodes. Why? Because when they come in and say of

1 course we're justified in terminating the St. Anne's
2 contract, look what they did to us; they converted this
3 ambulatory surgery center to hospital space and jacked
4 up the reimbursement rates.

5 When they argue that that's a legitimate
6 pro-competitive business justification for their
7 conduct, we want to show -- which we'll be able to when
8 we get the documents -- that in fact when other people
9 did that their reaction was completely different.

10 So the mere concern about the change in rates is
11 not the real motivation for the conduct. The real
12 motivation for the conduct is the anticompetitive
13 animus directed at Steward.

14 Same thing with the BlueCard Program. I
15 described a few minutes ago how part of what happened
16 with St. Anne's is they converted St. Anne's from
17 contract to BlueCard. Okay. We've asked, well, have
18 you thought about doing that for anybody else? We
19 understand it's -- I think it's only about four or five
20 Massachusetts hospitals with which Blue Cross has a
21 contract, so we've asked for documents that relate to
22 consideration or actually moving those hospitals off a
23 contract and onto BlueCard to, quote, save money, the
24 same way they said they were doing at St. Anne's.

25 They want to only give documents about the

1 episode that involves St. Anne's. That deprives us of
2 the documents that will show that St. Anne's was
3 treated differently than these other people, and that's
4 what we need to show, that it's not a legitimate
5 business justification at all but rather a pretext.

6 Same issue with respect to the OHIC regulations.
7 That's request number 19 and 20. They're willing to
8 provide documents about the effect of the OHIC
9 regulations on the Landmark negotiations. Well, the
10 question we're raising is whether that is a legitimate
11 justification or were you treating Steward/Landmark
12 differently with respect to the OHIC regulations? So
13 provide the documents that show how and what was said
14 about how OHIC regulations affected your reimbursement
15 rate discussions with other people.

16 I think it's the same dispute about quality.
17 I'm not sure they agree. We think that we had a lot of
18 debate about the formulation of the quality request.
19 What we're looking for, and we believe was asked for,
20 is how people are treated when they don't meet the
21 quality metrics that are in what has today become Blue
22 Cross's standard quality program.

23 Blue Cross submitted with their opposition an
24 affidavit saying that, well, you know, 2013 everybody
25 was on this standard program so we don't even know what

1 you're talking about. Well, what we're talking about
2 is that the operative events that matter for our case
3 took place in 2010, '11 and '12, and we know from
4 documents that we've seen that everybody was not
5 participating in a standard quality program.

6 We know in fact that some of the people who were
7 getting paid the highest reimbursement rates were being
8 criticized in Blue Cross's internal documents for
9 having a miserable quality program.

10 So when they come in and say refusing to pay the
11 rates Steward wanted for Landmark was justified because
12 of their unwillingness to participate in the quality
13 program, we want to be able to say wait a minute, how
14 come you let them, them and them not participate in the
15 quality program or have a worse quality control program
16 while you were paying them more money? So again, the
17 question is do they have to give documents that relate
18 to anybody but just them and us.

19 Okay. That takes care of all but two, and these
20 I think can be quick. Request 5-22 is about the Care
21 New England/Lifespan proposed merger.

22 What does that possibly have to do with the
23 case? One of the most important issues in the case is
24 what does Blue Cross think about the acquisition of
25 provider market power. They express concern about that

1 with respect to Steward's arrival, potential arrival in
2 Rhode Island. They were concerned about the
3 acquisition of market power by Steward.

4 Well, the proposed Care New England/Lifespan
5 merger would have been the biggest jump in provider
6 market power ever in this marketplace. So why do we
7 want to see documents that relate to that? Because we
8 want to see how Blue Cross discussed their concern
9 about provider market power when the providers at issue
10 were Lifespan and Care New England, rather than
11 Steward.

12 We also want to see whether the market
13 definitions in issue in every merger, just like it is
14 here, we just want to see whether the position that
15 they're going to take in this case is consistent with
16 the position they've taken. So it's the similarity of
17 issues and our right to test whether --

18 THE COURT: You're losing me on this one.

19 MR. KUNEY: Sure. Okay.

20 THE COURT: I'm having a hard time tying this
21 back, this one back to the allegations that you make in
22 the Amended Complaint. It seems a little far afield.

23 MR. KUNEY: Okay. The way it ties into the
24 Amended Complaint is the position that we -- the
25 position that we anticipate being articulated, because

1 it's already been articulated, that they were concerned
2 about a Steward network in part because the Steward
3 network would take these previously-struggling
4 community hospitals that were working on their own,
5 build them together into a network so that they would
6 have more push-back, more negotiating leverage, more
7 market power as a provider of hospital services. And
8 to them as an insurance company, that's a bad thing;
9 that they would be articulating what you sort of think
10 is the normal view of how insurance companies would not
11 necessarily want the providers to have more market
12 share, more negotiating leverage, et cetera.

13 What I said at the beginning is that what we
14 have alleged and will be proving here is that they
15 deviated that with respect to Lifespan in connection
16 with the conspiracy that we've described.

17 We also think they deviated with that from that
18 view in terms of the position that they took with
19 respect to the Care New England/Lifespan merger.

20 So it's kind of a candor test, if you will, your
21 Honor, of when you had a dramatic example of the
22 problem that you're citing as to why you're opposing
23 Steward; what did you say then when it wasn't Steward?
24 Rather, it was Lifespan and Care New England who
25 threatened you with a combination of market power on

1 the provider side way bigger than Steward could do in a
2 thousand years. That's the connection. There are
3 different facts, but it's the same issue and the same
4 justification, motivation, to be against Steward.

5 The last one, 5-31, I honestly don't even
6 understand why we have to be here about this. There
7 are I think, conservatively, hundreds of PowerPoints
8 that have been produced, many of which are charts.
9 These are internal Blue Cross documents. They are
10 charts that show rate comparisons among hospitals.
11 There are lots of different kinds; comparisons to
12 Medicare, comparisons to each other. Typically what
13 happens is the chart reduces the rate comparison to a
14 single number. It will say Landmark was paid
15 104 percent of Westerly, and then there will be these
16 little bar-grams.

17 We asked for the data and the software that was
18 used to compute those, because there's a thousand
19 different ways to take claim data about people and
20 dollars and translate them into a single digit
21 reflecting what reimbursement rates are. It's the
22 documents that specify how hospitals are reimbursed by
23 insurance companies that look like this. To turn that
24 into a single number, you're doing something.

25 They said, well, you know, do you need Excel?

1 Is there some kind of problem here? And we said, no,
2 we don't need Excel. What we need is the -- when you
3 actually have an Excel file open in front of you, the
4 way the person created it, you don't have to see the
5 numbers that land up in the columns; you see the little
6 formulas at the top that show how the numbers were
7 calculated. So we said with respect to those
8 PowerPoints that you've already produced, we're
9 entitled to see the Excel file in its original format,
10 in its native format so that we can understand where
11 the numbers came from.

12 In fact, we produced our documents that way. If
13 we produced a PowerPoint that was based on an Excel, we
14 provided the native version of the Excel file.

15 Their position is the Excel file has to be
16 independently captured by your discovery request. And,
17 well, a lot of Excel files have primarily numbers, and
18 the way this process works is there's search requests
19 and then there's search terms, and then you look at
20 them and see if they're called for. Well, search terms
21 are going to leave out most Excel files because they're
22 primarily numbers.

23 So we had a modest number because -- five, six
24 PowerPoints where we said we'd like to have the Excel
25 file that supports this, and they're: Do you want us

1 to buy you a copy of Microsoft Office? Which, between
2 you and me, I felt was a level of sarcasm that was a
3 little bit inappropriate for at least what we think is
4 kind of serious business here.

5 We don't want anybody to buy us Excel. We want
6 to see the version of the Excel file that has the
7 formulas so we know where those numbers actually came
8 from because those numbers are, again, an important
9 part of their -- some of the legends on the charts say
10 things like Landmark's not being underpaid, and then
11 there's this bar graph that shows all these different
12 single digit figures for these hospitals.

13 So we don't understand why they haven't already
14 produced the backup -- it's kind of like producing a
15 family member in connection with e-mails -- so that we
16 can see where these things came from.

17 I'm at the bottom of the list of requests.

18 One other comment I guess I would make in
19 advance is that in Blue Cross's opposition they express
20 concern about our request for unspecified searches, and
21 I just wanted to take 30 seconds and go through how
22 this process is worked throughout the case.

23 Both sides served discovery requests. The first
24 round of objecting and negotiating and meeting and
25 conferring is about the scope of the discovery request.

1 Once the discovery request is agreed upon, then
2 there's round two, which is discussion and meeting and
3 conferring about the search terms that will be used to
4 cull from the massive documents once expected to have a
5 chance to respond to the request.

6 Because we never reached agreement on the
7 request, of course we haven't specified the searches or
8 the search terms. But it's not complicated. To the
9 extent your Honor grants the Motion to Compel, we'll
10 serve them a set of proposed search terms for those
11 requests tomorrow. That's not a big deal.

12 So the fact that they're unspecified is simply
13 the fact that we got the process truncated because they
14 sort of head this off at step one, and so we never had
15 that discussion about what search terms might be used.
16 So we don't have any aspiration, any aspiration to have
17 broad search terms used at this point of the case.

18 I think, as they know, and I think you may have
19 gathered from our discussion about the other issues
20 that have come up recently, we're not interested in
21 prolonging the scheduling here. We know that we're
22 going to have to see Judge Smith soon about putting in
23 place a new schedule. We want it to be as short as we
24 possibly can.

25 We don't think the issue here is that we're

1 looking for a vast volume of documents. We think the
2 documents that we're looking for are terribly important
3 to the elements that we have to prove with respect to
4 the new claims that we introduced in the case through
5 the Amended Complaint. It may be a hundred documents
6 total, it may be 150, but they're documents that
7 matter; and that's why we've basically troubled the
8 Court with this motion.

9 THE COURT: All right.

10 MR. KUNEY: Thanks, your Honor.

11 THE COURT: I'll hear from Blue Cross.

12 MR. BERNICK: Thank you, your Honor.

13 I think the first thing to note is that we agree
14 with Mr. Kuney on the high bar that would be necessary
15 for Steward to satisfy in this case to establish a
16 conspiracy, and we'd submit that's a bar that they will
17 be unable to meet, but that's a dispute for another
18 day. That's not a dispute for today where the dispute
19 really relates to discovery motions and the gap, as
20 Mr. Kuney put it, between the parties' positions.

21 I will just note though in passing, given the
22 long preamble to Mr. Kuney's argument, that there's
23 nothing in the record that has been submitted that
24 establishes any, as Mr. Kuney put it, *quid pro quo*
25 related to Blue Cross, Lifespan or Thundermist that

1 shows any meeting of the minds between the parties in
2 trying to exclude Steward. It just doesn't exist, and
3 that's because the conspiracy doesn't exist. But
4 again, that's not the dispute for today. The dispute
5 is over the gap.

6 The primary point, and I think I can cut most of
7 this short because it's becoming glaringly obvious to
8 me where the disconnect is. It's almost as though
9 there's ships passing in the night.

10 Mr. Kuney is reading each of these requests in
11 isolation as though we haven't already agreed to
12 produce literally millions of pages of documents in
13 response to 167 other requests that Steward has served,
14 167 requests.

15 And just to give you some sense of what Blue
16 Cross has done in this case to date, because it has
17 expanded since the papers were filed, Blue Cross has
18 collected 35 million documents. We've collected eight
19 terabytes of information.

20 To put that in comparison, the entire printed
21 works in the Library of Congress is often estimated to
22 be between 10 and 15 terabytes, and we've collected
23 eight terabytes. That's about 600 million pages or
24 maybe 8,000 truckloads of documents. Blue Cross has
25 produced 1.7 million pages, or 237,000 documents. We

1 have reviewed documents for 25,000 hours. That's
2 12 years of man-hours spent reviewing documents for
3 this case. We've searched for 26 hundred search terms
4 and dozens of additional search terms since these
5 papers were filed, again, trying to find documents
6 responsive to those 167 requests.

7 And to cut to the chase, your Honor, the biggest
8 areas of disconnect appear to be, again, that it's
9 reading each one of these requests in isolation without
10 considering the other requests.

11 Blue Cross from the get-go, long before the
12 Amended Complaint was filed, agreed to produce
13 essentially all documents related to Steward, all,
14 across the board -- assuming they're not privileged --
15 all documents related to Landmark, assuming they're not
16 privileged; all documents related to negotiations or
17 discussions with business relationships of Rhode Island
18 hospitals, all, including Lifespan. And they've gotten
19 thousands and thousands of these documents. Every
20 single document from the files of the provider
21 contracting team related to discussions with these
22 hospitals they've received.

23 That covers the vast majority of the information
24 that Mr. Kuney came up here and described that they
25 need for their case.

1 In our view it's far broader than what would be
2 required to satisfy our obligation to produce documents
3 relevant to the claims or offenses in the case, but we
4 wanted to hopefully avoid the need to come in front of
5 the Court on these issues and agreed to produce all of
6 these documents.

7 Similar, with respect to Thundermist, another of
8 the other alleged co-conspirators, we've agreed to
9 produce all documents related to business relationships
10 regarding Thundermist.

11 So, your Honor, if you take those as a given,
12 that lurking in the background here is the fact that
13 we've agreed to produce literally hundreds of thousands
14 of pages of documents related to these issues, and
15 they're cherry-picking particular requests to say, oh,
16 we didn't agree to produce this; it's entirely subsumed
17 by other requests that we've agreed to produce
18 documents to.

19 What's really in dispute here is whether we
20 should go back and unwind what searches we've already
21 done, rerun new searches to hopefully find new and
22 cumulative information on some fishing expedition to
23 find nuances that fit into their conspiracy theory.
24 And that's where we have drawn the line, because our
25 original searches have just been so broad.

1 And I'll direct the Court's attention to the
2 papers that we submitted because I think it covers
3 those issues fairly well, unless there are requests
4 that we think cover these.

5 But I think it is worth taking a moment just to
6 focus on the categories that Mr. Kuney discusses
7 because I think I can maybe flag for the Court where
8 these documents come from and where we believe we've
9 produced the documents; and there essentially is no
10 gap, and we don't really understand why we're here
11 today.

12 First, though, I would split off a separate
13 category, and that's a category where we have no
14 documents, and we've submitted declarations to your
15 Honor explaining why we have no documents -- because
16 Steward didn't believe us when we told them and
17 persisted to bring the motion in any event -- and
18 that's related to the quality program and rate
19 comparisons.

20 We submitted a declaration from Mark Wagner, the
21 head of provider contracting, that attested that there
22 had been no hospitals that had failed or refused to
23 participate in the quality program. Steward's requests
24 only relate to hospitals that failed or refused to
25 participate.

1 Mr. Kuney stood up here and is attempting to
2 rewrite the request to mean something different about
3 whether or not hospitals are treated different with
4 respect to the quality program. But like I told your
5 Honor, Blue Cross is searching for every document
6 related to negotiations with hospitals and that
7 includes documents related to quality.

8 Specifically in response to these requests,
9 because we understood that Steward had it wrong, we
10 made an offer, a voluntary offer, even though it was
11 not covered by the request, to produce documents
12 showing the different quality metrics of the hospitals
13 and how the hospitals compared with those metrics. And
14 we're standing by that commitment. That provides a
15 full response to everything that Mr. Kuney stood up
16 here to request.

17 Similar with respect to rate comparisons, your
18 Honor, we're producing all of the spreadsheets in
19 native format, as Mr. Kuney requested.

20 I'm very confused here. I think originally
21 Steward thought there must be some sort of fancy
22 computer algorithm or program that was used to generate
23 these comparisons, and unfortunately it's not; it's
24 Mr. Fragney (phonetic), who sits in his office with
25 Microsoft Excel and pulls data out of the claims data,

1 which we have produced in full.

2 Even though Steward has not produced their
3 claims data, Blue Cross has produced all of their
4 claims data. And we've produced Mr. Fragney's
5 spreadsheets in native format so that all the values
6 and all the formulas can be revealed, as well as all
7 the PowerPoint presentations.

8 So at least for those buckets of information,
9 your Honor, there is nothing left to produce, and I see
10 no dispute. Nothing more exists beyond what we've
11 agreed to produce that's responsive to the request.

12 Your Honor, taking the next couple of categories
13 here, I think the first category that Mr. Kuney covered
14 related to the conspiracy theories that he described
15 early on, requests 2, 4 and 5 in the fourth set of
16 requests for production. Really those all are subsumed
17 within the categories of documents I was describing
18 earlier. You know, Mr. Kuney said they wanted
19 communications with Lifespan about shifting patient
20 volume. We're giving them all the documents in terms
21 of the discussions with Lifespan about business
22 arrangements. They have all those documents.

23 They talked about wanting to know why patients
24 go elsewhere for care. This one might require a little
25 bit more elaboration, your Honor, because again we've

1 agreed to produce all of our claims data, every single
2 health insurance claim for every single Blue Cross of
3 Rhode Island subscriber going back years that shows
4 where they're from, what ZIP Code, where they went,
5 whether it's Massachusetts or Rhode Island, why they
6 went there, the procedure that they received; and from
7 that information, the information that's used in these
8 antitrust cases to calculate market definition, they
9 will be able to draw whatever conclusions they want
10 about subscriber preferences for care.

11 But Blue Cross didn't stop there. We agreed to
12 produce documents about hospital service areas in
13 response to other requests, subscriber demographics and
14 documents specifically talking about geographic market
15 definition.

16 In our view it's a fool's errand to try to go
17 and conduct some additional broader search beyond what
18 we've agreed to produce. There's going to be far more
19 information than would be necessary to evaluate
20 geographic market definition or Steward's conspiracy
21 theories.

22 We also agreed to produce documents going to the
23 very specific issue about efforts to move patients from
24 Massachusetts to Rhode Island. That seems to be the
25 crux of the issue. We agreed to produce those

1 documents. It's all very confusing.

2 In relation to ACOs, we specifically agreed to
3 conduct a search for ACOs related to Steward, Lifespan,
4 Thundermist and Landmark, the specific entities that
5 are involved and the conspirators that are involved.

6 But again, your Honor, we didn't stop there. In
7 response to multiple requests, we agreed to produce
8 documents related to competition at large with insurers
9 and providers, including those insurers and providers
10 that might formulate ACOs. The reason why Steward is
11 seeing these documents in the production to bring to
12 your attention is that they've been produced. We're
13 producing all these documents relating to competition,
14 and we just don't understand why further or additional
15 burdensome searches are necessary, particularly given
16 that everyone seems inclined to move this along, given
17 the volume of documents we've produced so far. So
18 that covers Mr. Kuney's first bucket, I would say.

19 The second bucket, which I think they call in
20 their papers pretext, essentially it comes down to
21 this. Looking at whether or not Blue Cross is treating
22 other people differently than it's treating Steward, I
23 think, to summarize it very simply, that's what they're
24 looking for.

25 And we recognize that you could go on

1 ever-expanding circles to try to untangle various
2 situations where Blue Cross might have treated somebody
3 differently; and, you know, looking at documents
4 related to the merger strikes us as particularly far
5 afield in that regard. But let's stick to where we
6 think we have agreed with that, those demands.

7 Again, with respect to ASCs, we're producing all
8 documents related to negotiations with hospitals or our
9 reimbursement rates. The hospital is negotiating on
10 behalf of an ambulatory surgery center in the way that
11 Mr. Kuney described, that's all swept into those
12 documents, brought to bear.

13 But it's also worth noting that Steward itself
14 refused to produce documents about its own ASCs.
15 There's another -- and we briefed this and I'm not
16 going to drill down too far, but there's a clear double
17 standard permeating quite a few of these RFPs where
18 we've agreed to go far more broadly than Steward has.
19 They still demand more and demand specifically what
20 they have refused to produce to us. They have a
21 business strategy with respect to ASCs going in, buying
22 the ambulatory surgery center, changing the wallpaper
23 and increasing the price by \$12 million.

24 In our view that's a problem, and in Blue
25 Cross's view that's a good reason to start sending your

1 patients elsewhere, to protect consumers in Rhode
2 Island from high prices.

3 They've refused to produce documents discussing
4 how that strategy permeates their business model in
5 other ASCs and, you know, we think that's relevant to
6 the case. But they want to see all of our documents
7 related to ASC negotiations. Again, we've agreed to
8 offer those up to the extent they relate to the
9 hospital negotiations.

10 BlueCard is similar. They came -- BlueCard was
11 a pretext. You know, again, your Honor, we're
12 producing all documents related to negotiations with
13 hospitals found in Rhode Island. We're also producing
14 all documents related to the BlueCard situation at
15 St. Anne's and Southern New England Surgery Center.

16 We're going further than that, your Honor.
17 We're producing all of the contracts for Massachusetts
18 hospitals. We're producing all of the claims data,
19 whether the subscribers are treated in Rhode Island or
20 not. So in other words they have all information to
21 evaluate exactly how much hospitals in Massachusetts
22 were being paid, whether there was a direct contract or
23 not and how that compares to Steward's rates.

24 Going on a wild goose chase for additional
25 e-mail related to negotiations with these Massachusetts

1 hospitals is just cumulative and unduly burdensome in
2 light of the fact that we've given them the information
3 necessary to evaluate that core issue as to whether or
4 not we're treating St. Anne's the same as other
5 hospitals in Massachusetts.

6 But even beyond that, your Honor, we have
7 offered, in response to another RFP that Mr. Kuney
8 ignores, to produce documents discussing switching a
9 hospital from a direct contract to BlueCard. We've
10 already agreed to produce that. That seems to be the
11 core of the issue. But they've ignored it and instead
12 cherry-pick this particular RFP, where we don't believe
13 that we need to conduct a broader or more fulsome
14 search.

15 Finally with respect to OHIC regulations, your
16 Honor, they're regulations that cap the amount of
17 reimbursement rate increases that Blue Cross can
18 provide to hospitals at the consumer price index plus a
19 percentage ranging up to one percent. It's a binding
20 regulation on Blue Cross. There's some ability to
21 increase that reimbursement for quality performance
22 measures; but again Steward refused to tie any of the
23 reimbursement rates to quality metrics, and so Blue
24 Cross was constrained by these OHIC guidelines.

25 It's absolutely true that Blue Cross was bumping

1 up against those guidelines, Steward was demanding
2 more, and Blue Cross just couldn't do it; it's bound by
3 these regulations.

4 So we agree that it's a relevant issue, but
5 again, your Honor, we're producing all of the documents
6 related to hospital negotiations of other Rhode Island
7 hospitals.

8 To the extent OHIC regulations are an issue for
9 those other hospitals, they're going to be produced.
10 It's a wide goose chase to add new search terms to try
11 to find other things with OHIC regulations when we've
12 already agreed to search for documents that subsume the
13 category at issue.

14 And then I guess finally, your Honor, and I
15 saved this one for last because I think you indicated
16 that this was a difficult pill to swallow as well with
17 the Care New England-Lifespan merger.

18 If we extend discovery to the Care New
19 England-Lifespan merger, we could essentially come up
20 with any creative theory to tie any event in the health
21 care market in Rhode Island to this case.

22 There's no allegations in the Complaint about
23 this merger. There's no allegations that Steward had
24 anything to do with this merger.

25 We understand Mr. Kuney's point that Blue

1 Cross's position with respect to market definition and
2 market power and competition and negotiations with
3 providers are relevant to the case. That's why we've
4 agreed to produce those documents.

5 But to go one step further and require us to
6 produce all documents, all documents related to the
7 merger regardless of whether they have to do with those
8 issues is beyond the pale, your Honor.

9 We've agreed to produce documents related to
10 market definition, market power issues, competition
11 from hospitals, negotiations from hospitals. We're not
12 going to be withholding those documents to the extent
13 they deal with the merger. In fact, many of those
14 documents have been produced.

15 What we're saying here is we see no reason for
16 an additional wild goose chase into an event that had
17 nothing to do with the fact pattern in this case to try
18 to untangle other information beyond what Mr. Kuney
19 identified to the issues in the case.

20 So, your Honor, I think hopefully I've gone
21 through this quickly and given you a sense of where we
22 are.

23 Again, the fundamental gap here appears to be
24 that they're reading each one of these requests as
25 though it somehow limits our prior production, that we

1 haven't already agreed to produce literally hundreds of
2 thousands of pages of documents in response to these
3 other requests that cover precisely these issues that
4 they're discussing.

5 We believe that we have produced all the
6 documents relevant to the claims in this case or agreed
7 to produce all of those documents, and this has been a
8 massive, massive discovery undertaking. We don't
9 believe that we should reopen it on the basis of issues
10 that Mr. Kuney has identified, particularly given that
11 we're all covered by what we've already produced.

12 THE COURT: All right. Thank you, sir.

13 MR. KUNEY: Two minutes, your Honor.

14 THE COURT: Two minutes, no more.

15 MR. KUNEY: We do have a disconnect, your Honor.

16 When we got discovery requests served on us that
17 we thought we had already responded to, we said that.
18 Just take the Mr. Fragney example that Mr. Bernick
19 talked about. He said, gee, we've already given them
20 those spreadsheets.

21 That's not what their opposition or their
22 response said. Their response said we'll only give you
23 the spreadsheet if it's independently requested. If
24 those spreadsheets that we've asked about were already
25 in the production, I assume they would have done what

1 we did, which is written a letter saying here's the
2 Bates number, look them up, the documents are already
3 in there.

4 Second and last point. There's a difference
5 between documents that are negotiation documents and
6 analytical documents at Blue Cross about the issues
7 that might arise in those negotiations.

8 Their definition of what's a negotiation
9 document, so take the ASC example, well, we've given
10 them negotiations with hospitals that acquired ASCs.
11 Whether there's going to be discussion in the
12 negotiations about the acquisition about the treatment
13 of the ASC, who knows; we should go find that. We
14 said, well, these are discrete events. There aren't
15 that many of them. It's not a wild goose chase, nor is
16 it a massive task to find them, so that we can both
17 tell readily, easily, obviously, whether the Steward
18 acquisition of an ASC was treated differently.

19 The pretext argument is a real one. It's easily
20 dealt with. If the answer was we've already given you
21 all that stuff, that could have been their answer.
22 Instead what their answer has been is we're only going
23 to tell you about Steward, whether it's OHIC, ASC,
24 whether it's the quality issue, we're just going to
25 tell you about Steward, Landmark, St. Anne's; not,

1 don't worry, it's already in there.

2 It's not a wild goose chase, your Honor. It's a
3 targeted addition to the document production to date to
4 cover things that are new allegations and new
5 requirements of proof that roll out of the Amended
6 Complaint. That's all we're seeking.

7 It's interesting to me to hear it called
8 cherry-picking, because we made an effort to limit the
9 number of requests on which we filed our motion this
10 morning. It's not cherry-picking. It's finding the
11 ones that we thought were sufficiently important to our
12 proof requirements to burden the Court with bringing a
13 motion this morning.

14 Thank you, your Honor.

15 THE COURT: Thank you, sir.

16 Let's move on to Blue Cross's motion. That's
17 Document Number 111.

18 Mr. Tarantino.

19 MR. TARANTINO: Thank you, your Honor. With the
20 Court's permission what I'd like to do to try to narrow
21 and focus the argument is, with the exception of what I
22 may say at the very end, everything that we're talking
23 about, this really has to do with two issues. One is
24 the common interest privilege --

25 THE COURT: Yes.

1 MR. TARANTINO: -- and that's what I want to
2 spend the time arguing about. That's sort of the
3 substantive legal issue.

4 And the other has to do with whether Steward's
5 responses to various categories of discovery requests,
6 and they're listed, 7 through 13, 23, 25 through 27,
7 and 38 of the first set of requests for production of
8 documents, and then requests 2 and 4, whether those
9 have been adequately responded to.

10 I'm not going to spend time repeating the
11 arguments that we've put in the papers, because I think
12 we've done a good job explaining why we believe that it
13 is implausible, based on the responses that those
14 documents don't exist, based on other documents we
15 have, responses to requests for admissions and the
16 like. But we've already argued that.

17 THE COURT: Yes.

18 MR. TARANTINO: What I would like the Court to
19 do is to focus on not only what we say in those
20 arguments, but we have said if in fact you don't have
21 these documents, they don't exist; no matter how
22 implausible it seems to us that they don't, then give
23 us the kind of certification that Mr. Wagner gave.
24 Give us a certification and a declaration so that it
25 can be used to the extent relevant and appropriate in

1 the case.

2 So I don't want to burden the Court further on
3 those issues. You can read them. You already have.

4 THE COURT: I have, yes.

5 MR. TARANTINO: But I do want to focus on the
6 legal issue here, which I think is a very important
7 issue.

8 And I also heard the Court about the
9 post-briefing letters, but I want to focus on something
10 that is there because I think it's important to
11 understand, again in our view, why there cannot be a
12 common interest between Steward and the Special Master
13 in this case.

14 Let me talk about masterships and receiverships.
15 I'm not a bankruptcy lawyer or a mastership or
16 receivership attorney, but the nature of my practice is
17 I have litigated and had to litigate many matters,
18 adversary proceedings in those three types of courts,
19 including having to litigate an adversary proceeding
20 with respect to the Special Master and Blue Cross
21 before Judge Silverstein. So I was involved. I was
22 not Blue Cross's principal counsel in that case, but I
23 was involved. I was Blue Cross's litigation adversary
24 proceeding counsel in that case for the case that
25 ultimately was dismissed brought by the Special Master.

1 But the letter, the letters focus immediate on this
2 issue.

3 One thing that a Special Master, a receiver --
4 they're principally the same thing -- but one thing
5 that he or she has to do based on the role that he or
6 she plays, is they have to ask the court for
7 instruction and direction; and if they want to do
8 something because they're acting as a fiduciary for the
9 benefit of the estate and for the benefit of the
10 creditors of the estate, if they want to do something
11 beyond the ordinary, beyond what has been set forth in
12 the order appointing them as a receiver, they have to
13 ask the court for instructions. They can make a
14 recommendation to the court of how they would like to
15 act, but they have to ask the court for instructions
16 and permission. And we know that happened here because
17 there are documents, there are written agreements
18 between Steward and the Special Master.

19 Each time Steward wanted to do something beyond
20 what was granted -- I'm sorry -- the Special Master
21 wanted to do something with Steward or vice versa that
22 was going to go beyond the generalized order of what
23 the Special Master could do, they had to go to Judge
24 Silverstein and ask permission to do so.

25 For example, they wanted to enter into an

1 agreement for advisory services. This is at WW,
2 Exhibit WW to our Motion to Compel. And in order to
3 enter into that agreement, they had to ask for Judge
4 Silverstein's approval to do so, and there's a docket
5 entry where this happens and it gets approved. And
6 that agreement says, among other things, it says that
7 these parties are to be treated as independent
8 contractors of each other. And it says the Special
9 Master and Steward -- Steward is defined as the company
10 in the document -- specifically disclaim any fiduciary
11 or confidential relationship between them, whether
12 stated or implied by law.

13 That is the condition upon which Judge
14 Silverstein approved this document, because there is a
15 basis, an adversarial relationship between a purchaser,
16 prospective purchaser and the Special Master who is
17 acting on behalf of the estate and the creditors of the
18 estate. It is not a common interest.

19 Now they can work cooperatively to attempt to go
20 forward with that, but it is in basis an adversarial
21 relationship, and that only makes sense.

22 Steward is out to do the best deal it can for
23 itself. The Special Master has a fiduciary, and here a
24 fiduciary who is specifically disclaiming any such
25 relationship or confidential relationship with Steward

1 has a different set of duties.

2 So what does that mean for a common interest
3 approach? We're talking about, and this is important,
4 we're talking about legal common interest. The cases,
5 we've cited them, and Steward has as well. The cases
6 make distinctions between the business common interest
7 and a legal common interest.

8 In order to protect documents or other
9 information from disclosure in a litigation context, it
10 must be a legal common interest. Parties can always
11 have business common interests, but it has to be a
12 legal common interest.

13 What does it mean here with respect to the
14 approximately 3,000 documents that have been withheld
15 from production in this case based on a common interest
16 theory?

17 First, we know, we know that there is no written
18 common interest agreement. How do we know that? Well,
19 none was produced. But we also know that because if
20 there were to be such an agreement, it would have to be
21 presented and approved by Judge Silverstein because --
22 why? Because if there were such an agreement, that
23 would limit the kinds of things that the Special Master
24 could do. The Special Master would now have a
25 different kind of relationship with Steward, a common

1 legal relationship with Steward, and it would allow one
2 or both of these parties to claim the common interest
3 approach.

4 That would have to be presented to Judge
5 Silverstein, just as the other kinds of agreements were
6 presented to Judge Silverstein for approval.

7 You might say, well, do you have to have a
8 written agreement in order to have a common interest
9 privilege? The answer is generally no. But the same
10 agreement, WW that I read from, that specifically
11 disclaims any such relationship, says the agreement may
12 not be amended or modified orally, and no amendment,
13 modification, or attempted waiver shall be valid unless
14 in writing and signed by both parties and approved by
15 the court after notice and hearing.

16 So if they're saying this is an implied common
17 interest privilege -- doesn't have to be in writing,
18 doesn't have to be signed, the law sometimes recognizes
19 oral common interest agreements -- this agreement is
20 saying you don't have such a relationship, and it may
21 not be amended or modified orally. You can't do that.
22 And if you do want to amend it, you've got to come
23 back, it's got to be in writing, and you're to come
24 back to Judge Silverstein; again, because that type
25 agreement, a common interest, legal common interest

1 agreement limits what the Special Master may do. The
2 Special Master isn't free to do whatever he wants.
3 He's limited by a common interest approach.

4 None of that ever happened here. So separate
5 and apart for all of the other reasons that courts, we
6 believe, say here there can be no common interest
7 privilege because at base it's an adversary
8 relationship. We know this was never presented to
9 Judge Silverstein, and we know that the document that
10 was presented to Judge Silverstein he approved
11 disclaiming any such fiduciary or confidential
12 relationship, whether stated or implied by law.

13 I want to again focus on what's the Special
14 Master doing here; and this is extremely important. If
15 a party -- whether it's the Special Master, whether
16 it's Steward, whether it's Blue Cross -- if a party
17 believes that some document or some discovery request
18 is privileged, the response would be privileged, the
19 law says that the party has to claim the privilege
20 first. You claim the privilege. And when you claim
21 the privilege, ultimately if it is challenged you have
22 to show two things: It has been appropriately claimed,
23 and there has been no waiver.

24 But the first thing is it must be claimed.
25 Courts don't -- you don't know what the judge says; I'm

1 going to look to see on my own *sua sponte* if there
2 might be some documents that somebody in this case
3 might think are privileged and then I'm going to tell
4 those parties, you know, I think this document might be
5 privileged, any takers for a claim of privilege? That
6 doesn't happen. It's not the court's role. It is the
7 role of the party claiming the privilege to claim it
8 and then, if claimed and challenged, to show it has not
9 been waived.

10 Why am I making this point? Because there were
11 orders entered by Judge Silverstein where the Special
12 Master said with respect to the production it was
13 making or he was making in this case, there were
14 privileges that he wanted to claim, and he said what
15 they were.

16 Attorney-client privilege, and there were
17 attorney-client privileges of two types: One, there
18 was an attorney-client privilege between the Special
19 Master not acting as a Special Master, but a Special
20 Master is a lawyer, and other clients of his law firm.
21 He was concerned that inadvertently when running search
22 terms documents might be produced that would be
23 otherwise protected by the attorney-client privilege
24 that his law firm had with their other clients. So he
25 claimed that, and he said I'm going to -- I shouldn't

1 have to be able to produce -- shouldn't be required to
2 produce any documents and I'm claiming that privilege.

3 The second privilege was the attorney-client
4 privilege between the Special Master and his lawyer.
5 Again, not uncommon. Special Masters/receivers hire
6 their own attorneys, even if they are attorneys. They
7 hire an attorney to represent them in their capacity as
8 Special Master. And Mr. Savage did that, and
9 Mr. Savage retained lawyers in his firm, but they had
10 to be approved, again, by Judge Silverstein. And you
11 present and you say this is who I want to hire, this is
12 the rates that they will be paid, this is what they're
13 going to do and the like. And he claimed that
14 privilege.

15 The third privilege that he claimed was work
16 product, meaning his attorneys and his work product
17 because, as I just said, there were at least one
18 adversary proceeding. There were other clear disputes
19 that I wasn't involved in, but there clearly was an
20 adversary proceeding between Blue Cross and the Special
21 Master acting on behalf of Landmark where there was
22 litigation and he claimed the work product privilege
23 with respect to that. That's between Blue Cross and
24 the Special Master.

25 Never is there a mention of common interest

1 privilege, never.

2 Then Steward claims the common interest
3 privilege, and we get a production of documents from
4 the Special Master that do not include any Steward
5 communications between Steward and the Special Master.

6 Ms. Parker writes to the counsel for the Special
7 Master and says was this intentional? Are you
8 intentionally withholding communications between
9 Steward and the Special Master? And Mr. Halperin
10 writes back and says no, you should have gotten those;
11 I will look into that.

12 That's during the course of our briefing. And
13 so we read that since it hadn't been claimed, and he
14 said you will be getting those documents, we read that
15 as saying he's not claiming -- not only did he not do
16 it before, but he's not claiming now that there is an
17 alleged common interest between the Special Master and
18 Steward.

19 Steward, in a letter, challenges our
20 interpretation of that and so again, again I know
21 you're not key on the letters, but the letters tell
22 a --

23 THE COURT: No; they are what they are. I was
24 just talking about in the future.

25 MR. TARANTINO: Okay. So Ms. Parker writes back

1 and says, Are you claiming a common interest privilege
2 with Steward?

3 Mr. Halperin is a very good lawyer. What
4 Mr. Halperin says in effect -- you can read it, I'm
5 going to let the Court decide that -- I'm just saying
6 I'm not waiving any privilege that may exist.

7 Well, again, that's just not the way it works.
8 You can't say, in a piece of litigation, I really don't
9 know if this is attorney-client privilege or not,
10 Judge Almond; I'm going to produce the document, but I
11 just want to let you know I'm not waiving it if you
12 ultimately determine it is attorney-client privilege.
13 I'm not going to claim it's privileged, but if you
14 determine it is, I'm not waiving that privilege.

15 And the reason why I think that's being said is
16 we know it wasn't claimed, and he had a number of
17 chances to claim it, opportunities. But again, I think
18 his view is I have to be a little concerned here
19 because there is nothing going to Judge Silverstein
20 about common interest. But if, for example,
21 Judge Almond were to determine there is a common
22 interest and now it's been determined I've waived it,
23 that means, as Special Master or counsel to the Special
24 Master, I have given up some right that the Special
25 Master otherwise had. So this is a hedging your bets

1 response. And that may be okay in negotiations or
2 things along those lines, but basic privilege law is
3 you don't get to the issue of waiver without the claim
4 of privilege in the first instance. That must occur
5 first. Only then is there a determination of whether
6 there has been a waiver of that privilege.

7 So what do we know here? We know this wasn't
8 addressed and the only documents that appear to be on
9 point say, my reading, say the opposite of what Steward
10 is claiming now.

11 We know that -- and Steward was involved in the
12 negotiations of those orders, just as we were, meaning
13 the Special Master's claimed privileges. Steward
14 didn't say, well, what about the common interest
15 privilege, Special Master? The Special Master doesn't
16 say it; Steward doesn't say it. The orders get
17 entered, approved by everybody.

18 So this common interest privilege, in our view,
19 came way after the fact, way after the fact, and it
20 was, we believe, set forth as a way to withhold
21 documents that we believe may be the categories of
22 documents that -- this is the tie-in to the other
23 aspect of this motion now -- that where are they?
24 Where are these documents that we say are implausible
25 not to exist? Well, if they're all privileged, it

1 doesn't mean they don't exist. It means you don't have
2 an opportunity to get them because of a common interest
3 or some other privilege.

4 I can't tell the exact nature of the documents
5 that Steward has listed, the almost 3,000 documents,
6 but some of them just by the description appear to be
7 just communications between the lawyer for Steward and
8 the lawyer for the Special Master about drafting an
9 asset purchase agreement, drafting this agreement for
10 advisory services.

11 How can that be a legal common interest? I
12 don't see how it's possible that it could be. But
13 that's the kind of document that is withheld from
14 production here.

15 I can't tell as clearly based on the
16 descriptions of the other documents, but their
17 communications with the Special Master and people at
18 Steward, their communications with lawyers between the
19 two of them, again this is an adversarial relationship;
20 their communications between the Special Master and a
21 consultant who is supposedly acting on behalf of the
22 Special Master to help sell Landmark and Steward.

23 And the other thing that we point out is even if
24 for some reason all of this could fit nicely into one
25 or more of these cubbyholes, there can't be -- and

1 there could have been, let's say there could have been
2 at some point in time a common legal interest. Even
3 Steward says, because I think they have to, that if and
4 when those interests diverge, the common interest
5 privilege no longer exists. And we have set forth in
6 our papers the time frames. We've shown you in the
7 papers, based on documents that were produced by
8 Steward and others, that there came a point in time
9 long before Steward pulled out where those -- it's
10 clear Steward was going to pull out. It was clear the
11 Special Master knew Steward was going to pull out. And
12 they were communicating about that.

13 Now, we don't have what those communications
14 were because they're claimed to be common interest
15 privilege, but one of the defenses that we have to this
16 case -- Mr. Bernick is the antitrust lawyer. I'm the
17 trial lawyer. He can talk about all the legal things
18 that -- and Mr. Kuney did as well -- what needs to be
19 proved and what those defenses are.

20 I'm going to be much more centralized saying
21 what is the jury going to believe or not believe. And
22 if Steward's position is we didn't go forward with the
23 Landmark transaction because we were in effect
24 prohibited from doing so by Blue Cross and its
25 anticompetitive actions, that's what they want to argue

1 and they can talk about what the legal issues are and
2 figure out what gets to the jury or not.

3 I'm much more basic in saying if there are
4 documents between you and the Special Master that talk
5 about other reasons why you don't want to go forward
6 with this deal, such as maybe Landmark isn't what we
7 thought it was, maybe the quality of care isn't what it
8 was represented to be, maybe we've got this issue,
9 maybe we've got that issue; and we do have documents
10 talking about this.

11 But I want to see, as the trial lawyer I want to
12 see what was being said, what was being talked about by
13 Steward and the Special Master about the reasons why
14 this deal was going to fall apart. And they can
15 explain it, they can put it into context, they can do
16 whatever they want. I've got to do the job to convince
17 the jury that it's going to help my case, and they've
18 got to do the job to convince the jury I'm wrong about
19 that.

20 But if I never get to see them, if they're
21 protected by a common interest privilege then, you
22 know, talk about pulling the curtain. I want to see
23 behind the curtain, and I think I have an opportunity
24 to see behind the curtain because the only reason that
25 they're being withheld -- not because they're not

1 responsive -- they're being withheld on this alleged
2 common interest privilege.

3 And I want to finish up by asking you -- now
4 that you've heard why I don't believe the common
5 interest privilege can apply here -- if you take into
6 account those arguments I made in the papers in here,
7 and now you look at the three categories of documents,
8 A, B and C, we set forth, how the three -- I'm sorry,
9 how the various what we say are deficient discovery
10 responses fall into three different categories, I think
11 it will really help place into context our arguments
12 about how those documents must exist somewhere. Maybe
13 they exist somewhere among those 3,000 documents or
14 somewhere else on the many, many more. I think there
15 were 19,000 withheld documents on some claim of
16 privilege. The only thing before you is the common
17 interest privilege alleged between Steward and the
18 Special Master.

19 So for those reasons, your Honor, we believe
20 that there is no common interest privilege.

21 But even, more importantly, even if there could
22 have been one here, it never was presented to Judge
23 Silverstein, he never approved it, and what he did
24 approve seems to totally undercut the argument.

25 And then even when the Special Master was given

1 other opportunities to claim such a privilege, both in
2 the order relating to the production and then in the
3 e-mail communications, it never was done.

4 THE COURT: Thank you, sir.

5 Mr. Weingarten.

6 MR. WEINGARTEN: Good morning, your Honor.
7 Thank you very much. James Weingarten for the
8 Plaintiffs.

9 THE COURT: Good morning, sir.

10 MR. WEINGARTEN: I think I'd like to respond to
11 Mr. Tarantino by taking a level down from this
12 incredibly general place where he's put it and actually
13 discuss the scope of the claim of common interest that
14 Steward has made in its login before the Court and made
15 hopefully clear in its papers.

16 Steward asserted a common interest doctrine over
17 otherwise privileged communications between it, its
18 lawyers, that would have been held to have been waived
19 because they were given to the Special Master; but the
20 common interest is not a stand-alone privilege.
21 Mr. Tarantino keeps calling it a privilege. It's an
22 exception to the waiver rule.

23 The exception applies where the people who were
24 involved in the communication share a common legal
25 interest, and a common legal interest means something

1 like they have a common legal problem and they are
2 sharing otherwise attorney-client protected
3 communications to resolve that problem.

4 Mr. Tarantino doesn't seem to recognize the fact
5 that after the APA was signed -- and there were two of
6 them -- during those periods Steward ceased to be a
7 potential bidder, a potential acquirer, and became
8 imbedded inside the operations of Landmark.

9 During the period of the second asset purchase
10 agreement there was a Steward employee who was called a
11 consultant in the asset services agreement who sits at
12 Landmark. He is involved in all the myriad legal
13 decisions that go about with running a hospital. And
14 Steward and Landmark share a legal interest in the
15 outcome of many of those discussions and they are the
16 routine daily legal matters of running a hospital.

17 Some of them relate to the APA; for example,
18 getting regulatory approval so that Steward can
19 consummate its acquisition of Landmark. Now that's an
20 area where the two sets of lawyers and Steward and the
21 Special Master are working together with a shared legal
22 issue how to gain regulatory approval for this
23 acquisition, and they share a common legal interest in
24 the outcome. They want it approved.

25 So Mr. Tarantino's blanket assertion that this

1 process was adversarial and that the Special Master and
2 Steward cannot be working together in a common interest
3 is both too generalized and simply not true.

4 We pointed out in our papers there's no support
5 in the case law for any understanding that a Special
6 Master cannot have a common interest with another
7 entity, and in fact we argue it would be bad public
8 policy and it would harm the ability of the Special
9 Master to carry out his instructions from the judge if
10 he could not have common interests with other entities.

11 I want to make it very clear Steward is not
12 asserting a common interest privilege that is a blanket
13 cover for all of its communications with the Special
14 Master. Stuart has asserted that otherwise privileged
15 communications are not waived as to the privilege
16 simply because they are shared with the Special Master
17 in those narrow circumstances where Steward and the
18 Special Master/Landmark share a common interest in the
19 outcome of a legal problem. And again those
20 problems --

21 THE COURT: So for what period of time did they
22 share that common interest?

23 MR. WEINGARTEN: Your Honor, we tried to be as
24 narrow as we could, so in our view it was when the
25 asset purchase agreements were in place, August 27,

1 2010 to December 7th, 2010 and May 26, 2011 to
2 September 27th, 2012.

3 Even within that period, your Honor, I want to
4 be very clear. If there were communications that were
5 adversarial or they did not share a common interest, we
6 produced them. So this was not a blanket assertion.

7 Mr. Tarantino raised the issue of, well, I see
8 here there's discussions on the law about the asset
9 purchase agreement; if they were negotiating the asset
10 purchase agreement, I want those.

11 He has them. We did not claim a common interest
12 as to adversarial discussions.

13 We claimed a common interest privilege or a
14 common interest doctrine applied where the discussions
15 were about shared legal concerns where they wanted to
16 come out the same way. That's the basis of the common
17 interest doctrine. Lawyers should be able to advise
18 their clients and the privileged advice should not be
19 waived because a third party who also has a shared
20 interest in that legal outcome is involved.

21 I think, your Honor, that this doctrine arises
22 out of the criminal context. Co-defendants can have a
23 common interest in a joint defense. They don't need,
24 as Mr. Tarantino admitted, a written agreement to have
25 a common defense. The criminal defendants can share

1 with each other information on common issues of
2 interest that is protected; even if at the same time
3 there are other issues on which their interests
4 diverge.

5 So Mr. Tarantino wants to keep this at some very
6 high level and say that there could never be an
7 interest in common because they're adversarial
8 inherently. And we want to assure the Court that we
9 didn't do it at that level. We took it at a document
10 by document, communication by communication level to
11 determine if the communication in question was about an
12 otherwise attorney-client privilege communication that
13 the Special Master was brought into because they had a
14 shared legal interest in the outcome of that
15 discussion.

16 And some of it is about regulatory approval,
17 some of it is the quotidian work of, gosh, we're going
18 to hire a physician group for the hospital, we need the
19 following paperwork in place; what do Steward's lawyers
20 think about how to get that paperwork in place.

21 Those are legal questions that go to how to run
22 a hospital and they were discussing amongst each other
23 because Steward was imbedded in the hospital.

24 So we reject the notion, your Honor, we're
25 making some overbroad claim here. And we especially

1 reject the idea that we're doing so to sort of hide any
2 papers or any documents. I'll get to the document
3 question in a second.

4 Now, Mr. Tarantino said the Special Master has
5 to ask the Court for instructions and directions, and
6 we would point your Honor to many of the exhibits that
7 were attached to the letters. The reason we initiated
8 the letter correspondence was simply because we felt
9 the record needed to be clarified.

10 The Special Master got guidance from the court,
11 and the court's order has explained the Special
12 Master -- and I'll let Mr. Dawson speak to any further
13 questions because he's the one who had the discussions
14 with Preston Halperin about the Special Master's
15 representations.

16 But those orders speak for themselves. We don't
17 need to go into who said what to whom. The Special
18 Master was ordered to produce all his documents, and
19 there was an elaborate clawback procedure in case
20 anything privileged was released.

21 I want to be very clear. It's not just
22 Steward's privileged information that's at issue here.
23 The Special Master's privileged discussions -- which
24 Mr. Tarantino described all the different categories of
25 privilege discussions the Special Master might have --

1 those could be subject to a common interest doctrine as
2 well.

3 So if Mr. Halperin is advising the Special
4 Master or the people of Landmark on a legal issue and
5 brings Steward in because they have a common interest,
6 well, the Special Master was protected from that being
7 a waiver because it's a common interest. And his
8 production of documents in this case was pursuant to a
9 court order that said you've got to produce everything,
10 and if you have any troubles or something privileged
11 comes up, you can claw it back.

12 The distinction Mr. Tarantino draws saying,
13 well, they didn't mention the magic words "common
14 interest privilege," don't apply here.

15 First of all, it's not called a common interest
16 privilege. It's not something you have to assert
17 separately and along as this is my privilege. It's an
18 exception to the waiver for the attorney-client
19 privilege.

20 And I think it would be unfortunate if the
21 Special Master, contrary to the orders in Rhode Island,
22 were held to have waived a massive amount of
23 attorney-client privilege material that's his privilege
24 because he didn't use the magic words, oh, and the
25 common interest doctrine, which is just a background

1 rule of how the privilege operates.

2 We agree, your Honor, that this had to be a
3 legal interest and we think that that was the case
4 here. Again, it's an otherwise privileged document
5 that is not a waiver, because the person who is being
6 brought into the document shares that legal interest in
7 the outcome.

8 We released over 12 hundred documents. There
9 are communications with the Special Master as to which
10 there's no privilege, no common interest. And that's
11 all the business stuff. The cash flow reports, the
12 correspondence about how they're going to have a
13 working capital loan, financial information for
14 Landmark, business decisions about how to bill, about
15 contracts, about scheduling meetings, communications
16 plans, how we're going to roll out the patients, what
17 we're talking about here. We produced the draft
18 termination letters that they were discussing when they
19 decided they had to terminate the APA.

20 All of that got produced, your Honor, because it
21 was business discussion or adversarial. So again,
22 there's a huge amount of information that Mr. Tarantino
23 wants that he got, if it exists.

24 Now, Mr. Tarantino discusses the advisory
25 services agreement and he says, well, that agreement

1 has a section at Section 1.4 that says, well, we're
2 disclaiming any fiduciary or special confidential
3 relationship.

4 He correctly points out that's in the section
5 that's discussing how they're not going to be
6 independent contractors of each other. And we would
7 submit, your Honor, it would be implausible to read
8 that language so broadly as to exclude the ability of
9 the Special Master to have a common legal interest with
10 any entity simply because they're not fiduciaries of
11 each other. That language has a specific purpose.
12 It's to make sure that they are not implied
13 fiduciaries.

14 But just as in a criminal context,
15 co-defendants, their attorneys are not implied
16 fiduciaries of each other. Very clearly, in fact, they
17 owe their fiduciary duty to their own individual
18 clients. They still have, excuse me, common legal
19 interests.

20 So we don't think that language can be read that
21 way, and we certainly don't think it would be sensible
22 for this Court to hold that the disclaiming that you're
23 independent contractors forbids you from claiming a
24 common interest going forward. We don't think the
25 language supports that interpretation.

1 I'll also note Section 9.1 of the agreement says
2 in performing their respective duties hereunder,
3 company, that's Steward, and owners, that's Landmark,
4 and the Special Master, shall conduct themselves in
5 full accordance with all applicable laws.

6 Well, your Honor, the function of the privilege
7 is to help people get legal advice so that they can
8 conduct themselves in accordance with the laws, and we
9 don't think it would make a lot of sense to read one
10 section as saying, yeah, you're supposed to conduct
11 yourself in accordance with the laws, but because you
12 didn't use magic words about common interest in this
13 other section, all your legal advice, if you're working
14 together to fulfill your obligation to follow the law,
15 no more privilege there; you're not entitled to a
16 common interest to protect your interest.

17 I also want to address, your Honor, the
18 discussion about if our interests diverge, your Honor,
19 and I want to be very clear again that to the extent
20 the communications at issue show a divergence of
21 issues, we've produced those documents. So if they
22 were in an adversarial place, we produced those.

23 I want to address briefly, your Honor, this
24 question about, well, when interests diverge, when do
25 we know that. So we took a document by document

1 approach, which we think is the appropriate approach
2 when dealing with privilege and when dealing with the
3 common interest. The briefing in this that Blue Cross
4 submitted seems to suggest that -- you'll remember
5 there's an entire section on, well, certain e-mails
6 show that certain Steward executives had misgivings
7 about the deal and once they started having misgivings
8 about the deal there could no longer be a common
9 interest.

10 That's not a document by document discussion,
11 your Honor. That's at a level of generality that
12 simply does not make sense. There is no case holding
13 that just because some executives at a company have
14 e-mail discussions questioning a deal they can't have a
15 common interest. And I think that's very important,
16 and I think Mr. Tarantino basically walks away from
17 that position because he knows that there cannot be a
18 rule that based on cherry-picked e-mails the common
19 interest doctrine falls apart and there can never be a
20 common interest.

21 Again, his concern about missing documents, your
22 Honor, there are 60,000 documents we produced in this
23 case that have the word Landmark or LMC, an
24 abbreviation for Landmark, in them. They've got the
25 documents.

1 Mr. Tarantino says, well, all I want is a
2 certification, an affidavit, just like what we put in.
3 First of all, there's a difference between a
4 court-ordered certification, which language I'm not
5 sure about and they haven't proposed any, and a
6 self-serving affidavit that an attorney crafts for his
7 client to sign.

8 Second, there's no basis in this case for
9 requiring such. There's two reasons why there's no
10 basis. One, we said to them, we've said in our
11 papers -- and I'm saying to you now, your Honor -- that
12 we conducted a very diligent search that we looked over
13 26 custodians, we searched millions of documents, we've
14 produced 120,000 documents. Blue Cross was privy and
15 agreed to our custodian list and our search terms.
16 There's no basis for finding, Judge, that we've been
17 somehow dilatory in our search process.

18 And the cases that Blue Cross cites saying,
19 well, courts do order people to sign certifications, we
20 point out in our brief. Those are cases where people
21 either failed to comply with a previous motion to
22 compel that was granted, or there's some external
23 indicia of something going on; for example, e-mails
24 that say here's the attachment and there's no
25 attachment. Or deponents give testimony saying, oh,

1 yeah, I made documents, and the documents weren't in
2 the case file or discovery record.

3 There's nothing like that here, your Honor. And
4 I'm sorry that Blue Cross thinks certain documents
5 should exist, but they don't. And we point out in our
6 opposition we even went back and conducted a
7 reinvestigation on some of these categories.

8 And you'll see in the opposition where we said,
9 well, they said there's no board minutes. Here are the
10 board minutes that we produced.

11 They said there's no discussions with Cerberus,
12 the private equity firm that owns Steward. Here's all
13 the documents with Cerberus that we produced.

14 Oh, by the way, they looked at the Cerberus
15 production and didn't point out to your Honor or to us
16 a single document where it says from Cerberus to
17 Steward, hey, Steward, why didn't you have that in your
18 production? There's none of that either. No missing
19 document that a third party produced. They'll even be
20 an indicia that maybe your process was flawed. All
21 they say is, well, you and Cerberus talk a lot about
22 hospitals, you'd think there would be more that you're
23 talking about Landmark.

24 At the end of the day regarding the documents,
25 your Honor, this was unfolding in realtime. They have

1 all the business discussions about the negotiations
2 with Blue Cross, about the negotiations with
3 Thundermist, about what's going on. And it's unfolding
4 in realtime to the point that the participants know
5 what they're thinking and are expressing that to each
6 other, and they have all the non-privileged documents
7 about that.

8 And so if the thrust of their memo and their
9 motion there ought to have been a giant summary formal
10 memorandum or presentation explaining all the reasons
11 why the deal didn't come through, there is no such memo
12 or presentation. We've re-investigated the issue and
13 we're confident it does not exist. And the reason it
14 does not exist is because this was unfolding in
15 realtime.

16 They have all the documents showing all the
17 different issues that were coming up and all the
18 discussion between Steward executives about their
19 reactions to Blue Cross's proposals; this makes sense,
20 this doesn't, this is going to kill the deal, this
21 won't. They have that, if it's not privileged. And
22 there's no basis for their assertion that we're using
23 our privilege claims to hide key documents in this
24 case, simply none.

25 So again, your Honor, I'm happy to answer any

1 questions.

2 But our view is we need to keep this at the
3 level of what kind of common interest did Steward
4 claim. It's not a separate privilege. It's a
5 protection against a waiver. We went document by
6 document. We appropriately asserted where there were
7 shared legal interests. And Mr. Tarantino's
8 representations about how special masters are
9 inherently adversarial of potential merger partners
10 just simply don't apply. Once the APA is signed,
11 Steward is imbedded in that organization and they are
12 participating in a host of legal issues with a common
13 legal strategy; and there's no basis for your Honor to
14 overturn the discovery orders, the clawback provisions
15 that were agreed to in the Rhode Island court.

16 I'd like to just add one more thing. There's
17 one little e-mail here, your Honor. I shouldn't say
18 little. There's an e-mail from Mr. Tarantino that they
19 attached, February 26th, it's attached to one of their
20 letters. Mr. Tarantino says: We believe that Blue
21 Cross and Steward should continue to adhere to the
22 court's multiple orders. If a party locates a
23 privileged document, it should follow the agreed-upon
24 court orders to allow the Special Master to implement
25 the clawback provision.

1 That's Mr. Tarantino's e-mail. So he's well
2 aware that when the Special Master, who is resource
3 constricted, is ordered by the court to produce all the
4 documents, that there's a clawback provision to be
5 implemented if privileged documents gets released. And
6 we think this correspondence otherwise speaks for
7 itself. Again, if you ever any particular questions on
8 that, Mr. Dawson had the direct conversations.

9 But I think, your Honor, that's where we stand.
10 If you have any questions for me, otherwise --.

11 THE COURT: No questions.

12 MR. WEINGARTEN: All right. Thank you, your
13 Honor.

14 THE COURT: Thank you.

15 MR. TARANTINO: A few minutes (unintelligible).

16 THE COURT: Sure.

17 MR. TARANTINO: The first thing is I don't know
18 how we could have done a document by document
19 determination when we don't have the documents on the
20 privilege log.

21 What we did is we pointed to the documents that
22 we did have produced by Steward or some third party to
23 make the arguments.

24 THE COURT: I didn't think he said that you
25 should have done that. He said we did when we were

1 determining what to claim as privileged.

2 MR. TARANTINO: He criticized -- he said I'm up
3 here. All I'm saying is this can't be. It needs to be
4 a document by document review. Well, I don't have the
5 documents.

6 The second thing is, and he cut the quote short
7 from the agreement for advisory services. I want to
8 read the full quote. He cut it short at fiduciary
9 relationship. This is the full quote: The Special
10 Master and company, Steward, specifically disclaimed
11 any fiduciary or confidential relationship. It's
12 fiduciary relationship or a confidential relationship,
13 whether stated or implied by law.

14 Even if you accept the argument that, well, this
15 really is talking about waiver and not privilege, it's
16 the same thing with respect to work product. Work
17 product is called doctrine, too, and so is common
18 interest doctrine. They're -- typically cases talk
19 about work doctrine privilege, work product doctrine,
20 common interest privilege, common interest doctrine.
21 It's the same thing.

22 But if there was -- in order for there --
23 there's a case called *United States v. Textron* that I
24 tried before judge Torres here. I won it before Judge
25 Torres on the work product issue and whether documents

1 were protected by work product and with whom and to
2 whom they may be shared. Judge Torres ruled in my
3 favor on this. Initially I won in the First Circuit
4 two to one affirming Judge Torres, and the First
5 Circuit *en banc* reversed four to three.

6 And just like common interest work product,
7 there's a body of law that does say you can share
8 certain documents with others if there is that kind of
9 confidential relationship in certain circumstances.
10 It's not typical, but in certain circumstances, but not
11 when you disclaim there is such a relationship.

12 If there's a document that disclaims the
13 relationship, I don't know how you can then say if it
14 falls within the exception of sharing a privilege
15 document with someone who is supposed to be in that
16 confidential relationship with you. And if after the
17 fact they wanted to be able to share such
18 communications, attorney-client privileges, then they
19 should have gone back to Judge Silverstein, because
20 that would be something either stated or implied by
21 law.

22 So I understand the argument, I understand that
23 there can be circumstances where you can argue there
24 should be no waiver, even if an attorney-client
25 privilege communication was shared with someone else

1 because there was some kind of confidential
2 relationship with that someone else, but I don't see
3 how you can do that in this case where it has been by
4 contract approved by Judge Silverstein, disclaimed that
5 any such relationship exists or is allowed to exist.

6 And the last thing that I would say, your Honor,
7 is again you can look. You cannot tell from that log,
8 you cannot tell what it is based on the descriptions,
9 what's the nature of the document that is being
10 withheld; you can't. And this would be an extremely
11 broad net. Let's assume that the agreement for
12 advisory services didn't even exist. It would be an
13 extremely broad net to be able to say Steward could
14 share not only with the Special Master, but with
15 consultants and with others, and somehow say that's not
16 a waiver of whatever they want to call the privilege,
17 whether it's work product or whether they want to call
18 it attorney-client. That would be extremely broad
19 anyway.

20 But in the context of this case where it is
21 defined in my view not to exist, I don't see how
22 Steward could do that. It's not like Steward wasn't a
23 party to this agreement. If we were trying to argue
24 there was an agreement between two other folks and
25 Steward said, well, but it shouldn't affect us, we

1 weren't a party to it. They were a party to this.

2 So I agree there are cases, there is authority
3 in certain circumstances where there can be a sharing,
4 where there is a particular kind of relationship
5 demonstrated, and that's the burden on the party
6 claiming that privilege. But I don't understand how it
7 can exist here based on the circumstances of this case
8 and in the face of that explicit language in the
9 agreement for advisory services.

10 THE COURT: All right. Thank you.

11 I'll take the matter under advisement. I'll try
12 to get you a ruling as soon as possible so we can keep
13 this case moving along.

14 Court will be in recess.

15 (Adjourned)
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C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes of the audio
recording in the above-entitled case.

/s/ Denise P. Veitch
Denise P. Veitch, RPR

July 7, 2016
Date